

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN K. FUGATE)	
Claimant)	
VS.)	
)	Docket No. 214,259
STARDUST FEED, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY))	
STATE FARM FIRE & CASUALTY)	
Insurance Carriers)	

ORDER

All parties, including two separate insurance carriers, have appealed from an Award entered by Administrative Law Judge Jon L. Frobish on January 23, 1998. The Appeals Board heard oral argument August 14, 1998. Bryce A. Abbott was appointed Board Member Pro Tem to serve in place of Board Member Kenton D. Wirth who recused himself from this proceeding.

APPEARANCES

David M. Bryan of Wichita, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and Continental Western Insurance Company. James A. Cline of Wichita, Kansas, appeared on behalf of respondent and State Farm Fire & Casualty.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits for a 36.5 percent work disability based on a 73 percent task loss and a 0 percent wage loss. The wage loss was treated as 0 percent because of a finding that claimant did not make a good faith effort to find employment after the injury. On appeal, all parties dispute the ALJ's conclusion about the nature and extent of claimant's disability.

The ALJ assessed one half of the award against State Farm Fire & Casualty (State Farm) and the other half against Continental Western Insurance Company (Continental). He did so based on a finding that both insurance carriers had coverage of respondent on the date of accident, June 25, 1996. On appeal to the Board, State Farm contends that it should not be responsible for any portion of the award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant should be awarded benefits for a 5 percent disability and the award should be against respondent and against both insurance carriers jointly and severally.

Findings of Fact

1. On June 25, 1996, claimant injured his back when he fell while loading bags of dog food. A bag of dog food fell approximately ten feet, landed on claimant's chest, and knocked claimant onto a palette.
2. Claimant treated first with Dr. Papish who, after approximately one month, referred claimant to Dr. Thomas W. Kneidel. Dr. Kneidel in turn referred claimant to Dr. Philip R. Mills. Dr. Mills first saw claimant on December 5, 1996. He diagnosed back sprain with SI joint involvement secondary to a torsional injury. Dr. Mills provided conservative treatment which included physical therapy, anti-inflammatory medications, and SI joint injections. Dr. Mills rated the resulting impairment as 5 percent of the whole body. He also recommended restrictions based on a FCE.
3. The restrictions recommended by Dr. Mills were as follows:

He should sit no more than 4 to 5 hours with regular breaks. He should stand no more than 3 to 4 hours with 30 minute durations. He should walk no more than 4 to 5 hours frequent, moderate distances. His bend/stoop should be no more than occasional. Climbing stairs, crouching, and balance type activities should also be only occasional. He should use his right foot no more than occasionally. Lifting restrictions would be no greater than 50 lbs. above shoulder level, no more than 75 lbs. desk to chair, no more than 50 lbs. chair to floor; these are all bilaterally occasional. He should carry no more than 50 lbs. in either upper extremity occasionally. He should push or

pull no more than 100 lbs. occasionally. On a frequent level he should lift no more than 40 lbs. above his shoulders, desk or chair, and no more than 30 lbs. chair to floor. He should carry no more than 25 lbs. in either arm. Push is limited to 75 lbs. frequently and pull is limited to 30 lbs. frequently. He is limited in the use of his left foot to frequent. There are no restrictions for his hands or neck.

4. Dr. Mills reviewed a list, prepared by Jerry D. Hardin, of the tasks claimant had performed in work during the 15 years before the date of accident. Mr. Hardin identified 17 tasks and Dr. Mills agreed with Mr. Hardin's opinion that claimant could not do 12, or 71 percent, of those tasks.¹ Dr. Mills was also shown a list of tasks prepared by Karen C. Terrill and opined that they both, meaning Mr. Hardin's list and Ms. Terrill's list, "look great."

5. The Board finds claimant has the ability, after the current injury, to earn \$7 per hour. This finding is based on the opinion of both vocational experts, Ms. Terrill and Mr. Hardin, who testified claimant would earn from \$6 to \$8 per hour. The Board also concludes claimant retains the ability to work 40 hours per week. Claimant has testified that his medical restrictions would limit the number of hours he could work per day. There were restrictions on the number of hours claimant performed certain activities, but the Board finds nothing in the restrictions by Dr. Mills which would necessarily limit either the number of hours worked per day or the number of hours worked per week.

6. Dr. Robert A. Rawcliffe, Jr., also evaluated claimant's injury. Dr. Rawcliffe, who saw claimant on October 24, 1997, at the request of respondent's attorney, concluded claimant suffered an acute lumbosacral sprain/strain as a result of the accident, but Dr. Rawcliffe did not believe claimant sustained any permanent impairment. He testified he would consider temporary restrictions appropriate but opined that claimant would improve if he followed the exercise program and should have no permanent restrictions. Dr. Rawcliffe also testified that there was no medically recognized condition described, as Dr. Mills did, as torsional injury.

7. After he was released from treatment by Dr. Mills, claimant spoke with a representative of respondent and it was mutually agreed that claimant would not be able to perform the work for respondent with the restrictions imposed by Dr. Mills. Claimant then worked approximately one month and one week at the Crazy Horse Supper Club washing dishes for 40 hours per week at \$5 per hour. Claimant was not able to continue because being on his feet all day made him too sore. Claimant then found employment at Sam's Place washing glasses and stocking the beer cooler. He was doing this job at the

¹ Mr. Hardin's report gives a 73 percent loss rather than 71 percent because he calculates a percentage task loss for each job, adds those percentages together, and divides by the number of jobs. This calculation by Mr. Hardin yields a slightly different percentage, in this case 2 percent different, than is arrived at by taking the total number of tasks claimant cannot do and dividing that number by the total number of tasks. The Board uses the latter method.

time of the regular hearing, working 3 nights per week, or 18 hours per week, at \$5 per hour. The record does not indicate claimant has sought or applied for work otherwise.

8. Respondent purchased a workers compensation insurance policy from State Farm for the period September 6, 1995, to September 6, 1996. Respondent also had building insurance with State Farm which expired April 22, 1996. Respondent thought the State Farm workers compensation insurance expired at the same time as the building policy on April 22, 1996. Respondent, therefore, purchased a workers compensation policy from Continental which was effective April 22, 1996, through April 22, 1997.

9. Claimant's initial pleadings identified Continental as the insurance carrier. The claim proceeded against Continental only until Continental filed a motion to apportion 50 percent of certain fees against State Farm. State Farm then entered its appearance and thereafter State Farm was represented at depositions and hearings.

10. In October 1996, State Farm refunded to respondent a portion of the premium paid representing refund of the premium for the period from April 22, 1996, to September 6, 1996. Respondent has accepted that refund.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board agrees with and affirms the finding that claimant's injury resulted in a functional impairment of 5 percent. This finding is based on the testimony of Dr. Mills.

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after

the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. The Board agrees with the conclusion by the ALJ that claimant has not proven that he made a good faith effort to find appropriate employment. The Board, therefore, would impute to claimant the ability to earn \$7 per hour for a 40-hour week, based on the testimony of Ms. Terrill, for a weekly wage of \$280, or more than 90 percent of his preinjury wage.

7. Claimant is, therefore, awarded benefits based on the 5 percent functional impairment. K.S.A. 44-510e.

8. The Board reverses the decision to assess 50 percent of the award against each insurance carrier. The respective liability of insurance carriers is not to be decided in the workers compensation proceeding unless the employee's interests are involved. *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 794 P.2d 662 (1990). Instead, the award in the workers compensation proceedings should be against both disputing carriers jointly and severally with their respective rights determined in a separate independent action. *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961); *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968). The Board, therefore, finds this award should be made against State Farm and Continental jointly and severally.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on January 23, 1998, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brian K. Fugate, and against the respondent, Stardust Feed, Inc., and its insurance carriers, Continental Western Insurance Company and State Farm Fire & Casualty, jointly and severally, for an accidental injury which occurred June 25, 1996, and based upon an average weekly wage of \$248.13, for 43 weeks of temporary total disability compensation at the rate of \$165.43 per week or \$7,113.49, followed by 19.35 weeks at the rate of \$165.43 per week or \$3,201.07 for a 5% permanent partial disability, making a total award

of \$10,314.56, all of which is presently due and owing in one lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David M. Bryan, Wichita, KS
Richard J. Liby, Wichita, KS
James A. Cline, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director